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Individualism, Privacy, and Poverty in Determining the Best Interests of the Child

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Honors Thesis

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Abstract

This thesis explores the guiding legal standard in child custody law, that custody should be decided ‘in the best interests of the child.’ I begin with the most common critique of the best interests standard: that it is too vague, allowing for the personal biases of judges to play too great a role in custody decision-making. I challenge this critique by examining the standard in a different context, shifting from divorce proceedings to the child welfare system, to ask how the vagueness of the standard is mobilized differently in child protective proceedings. I argue that it is not the individual biases of judges, but rather the historic, systemic biases, enabled by the vague standard, which predominantly harm families and children. I examine how bias, privacy, and poverty influence interpretations of the ‘best interests’ standard in a child welfare context, through the lens of individualism as a dominant legal and political norm in the U.S.

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Introduction

“There can be no doubt that in every custody dispute the fundamental issue is the best interest of the child.” (Ellerbe v. Hooks (1980), 490 Pa. 363 at 372)

Most people have some familiarity with child custody law in the context of divorce. Almost half of all married couples in the United States get divorced¹ and almost half of all married couples’ children experience the divorce of their parents before the age of eighteen.² Most people will come into contact with divorce either through personal experience or through the experience of a friend or relative. The average U.S. citizen is less familiar with child custody law in the context of the child welfare system. While child welfare institutions have an expansive presence especially in larger cities, their impact is disproportionately concentrated among the poor.³ The average U.S. citizen is thus less familiar with the child welfare system than the phenomenon of divorce. I begin this thesis with a discussion of child custody law in the more familiar context of divorce in order to prime a discussion of child custody law in the child welfare system.

The guiding legal standard in child custody law is the ‘best interests of the child.’ The literature on child custody law frequently addresses the difficulty of determining any given

¹ “Marriage & Divorce.” *American Psychological Association*, American Psychological Association, 2000, www.apa.org/topics/divorce/.

² Fagan, Patrick F., and Robert Rector. *The Effects of Divorce on America*. Heritage Foundation, 2000. p. 1

³ “There are separate systems for poor and for wealthier families. Public child welfare departments that investigate child maltreatment and place children in out-of-home care handle almost exclusively problems of poor families.” Roberts, Dorothy E. *Shattered Bonds: the Color of Child Welfare*. Basic Civitas Books, 2002. p. 26

child's best interests in the midst of divorce proceedings in family court. Scholars criticize the standard for its vulnerability to bias, claiming that its vagueness compels decision-makers to rely upon personal beliefs about parenting and children. (Scott & Emery 2014, Elster, 1987; Fineman & Opie, 1987; Mnookin 1975) Determining which factors will or will not meaningfully interfere with a child's upbringing and which of these factors might fairly and reasonably be brought into the courtroom, require multifaceted, subjective assessments. Answering these difficult (often, as some scholars claim, impossible⁴) questions, family court judges make decisions that drastically impact individuals' lives. The vagueness of the best interests standard combined with the sensitivity, impactfulness, and personal nature of custody decisions, motivates scholars' concern with the standard's susceptibility to bias. Furthermore, the indeterminacy of the standard allows prejudicial decisions to be legitimized in the name of the 'best interests of the child.' I refer to the standard's inconclusiveness and consequent vulnerability to bias throughout this thesis as the 'indeterminacy problem.'

However, the problem with the role bias plays in custody decision-making, especially in the realm of child welfare law, is critically mischaracterized as a problem of inconclusiveness and individual bias alone. Focus upon the standard's practicability detracts from deeper inquiry into the cultural, historic biases the standard's indeterminacy permits. Scholars' focus on indeterminacy alone without critical analysis of what indeterminacy permits mischaracterizes the harm at stake as incidental and individual rather than systemic and societal. To view prejudicial applications of the standard as mere results of variable, individual biases is to ignore how deeply ingrained these patterns of harm are in the child welfare system.

⁴ Elster, Jon 'Solomonic Judgments: Against the Best Interest of the Child,' 54 U. CHI. L. REV. 1 (1987)

Section 1 surveys the best interests standard in divorce cases and the construction of the bias at hand as an incidental, individual problem. Section 2 discusses the evolution of the legal status of the child as an individual and the justification for state intervention into family privacy on the individual child's behalf. Section 3 argues that parenting rights are weaker than other privacy rights because their exercise is inherently less individual. Section 4 argues that, due to a construction of poverty as an individual problem, poor, often black mothers do not have privacy rights in the child welfare system.

1. The Individualization of Bias: Limits of the Indeterminacy Critique

In every state, though often differentiated by state-specific stipulations called 'intermediate rules', the fundamental concern judges must consider in deciding custody cases is the same: the best interests of the child.⁵ Yet the interests of the child are not the judge's only fundamental consideration. The Supreme Court has historically recognized "the interest of parents in the care, custody and control of their children." These interests are, as Justice O'Connor proclaimed in *Troxel v. Granville* (2000), "perhaps the oldest of the fundamental liberty interests recognized by this Court."⁶ Both the indeterminate 'best interests' of the child as well as the privacy rights of parents are fundamental considerations. Custody cases require judges to balance and interpret these fundamental concerns, delivering highly impactful verdicts for parents and children.

⁵ *Ellerbe v. Hooks* (1980), 490 Pa. 363 at 372

⁶ *Troxel v. Granville* (2000), 530 U.S. at 65.

During his 2005 confirmation hearing, Chief Justice John Roberts famously told the Senate Judiciary Committee “Judges are like umpires. Umpires don’t make the rules; they apply them.”⁷ However, in an area of law so bound up in cultural values, personal beliefs, and private life as child custody, the role of the judge can hardly be likened to “calling balls and strikes.”⁸ While a more narrowly-tailored standard would lend itself to clearer parameters for interpretation and make application an easier task for an impartial umpire, one theoretical upside of the best interest standard’s broad indeterminacy is that it allows judges to consider the multitude of factors unique to each family and circumstance. However, the degree of discretion judges exercise in determining what is or is not within a child’s best interests, scholars argue, places a concerning degree of power in the hands of the judge.⁹

The Indeterminacy Problem is Traditionally Critiqued as a Function of Individual Bias

The indeterminacy problem has been criticized widely throughout child custody literature as a function of individual bias.¹⁰ One of the most widely-cited critiques of the standard is Robert Mnookin’s article, ‘Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy’ (1975). Mnookin claims that “what is ‘best’ or ‘least detrimental’ for a particular

⁷ Cillizza, Chris. “John Roberts, Umpire.” *The Washington Post*, WP Company, 28 June 2012, www.washingtonpost.com/blogs/the-fix/post/john-roberts-umpire/2012/06/28/gJQAx5ZM9V_blog.html

⁸ *Id.*

⁹ See Elizabeth S. Scott & Robert E. Emery, Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard, 77 *Law and Contemporary Problems* 69-108 (2014), Jon Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. CHI. L. REV. 1 (1987), Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 *Law and Contemporary Problems* 226-293 (Summer 1975)

¹⁰ *Id.*

child is usually indeterminate and speculative” and that “there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes.”¹¹ In an article building on Mnookin’s critique, ‘Solomonic Judgments: Against the Best Interest of the Child’ (1989), political theorist Jon Elster also discusses the threat of indeterminacy in terms of individual bias. Elster argues that in many cases, a truly impartial application of the standard under the law renders no clear preference for either parent. This requires a broad qualitative evaluation of often unknowable facts, prompting the judge to allow personal beliefs to fill an inappropriate supplemental role. Elster argues that the subjective or moral reasoning judges rely upon often reflects personal bias above a genuine assessment of children’s interests.

Intermediate Rules Adopted to Clarify the Best Interests Standard can Contribute to the Indeterminacy Problem

To remedy the indeterminacy problem, many state legislatures have attempted to clarify the best interests standard to decrease the risk of bias leading to unfair or biased decisions. Since the adoption of the Uniform Marriage and Divorce Act (UMDA) by the National Conference of Commissioners on Uniform State Laws in 1970, and subsequent ratification by the American Bar Association in 1974, most states have adopted legislation adding guiding parameters to state custody laws. These parameters, called ‘intermediate rules’ delineate common factors in custody cases to be considered by judges. Intermediate rules inform unique versions of the best interests standard in each state.

¹¹ Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 *Law and Contemporary Problems* 226-293 (Summer 1975) Available at: <https://scholarship.law.duke.edu/lcp/vol39/iss3/8>

The UMDA proposed some of the most widely accepted intermediate rules, including the wishes of the child's parent or parents as to his custody, the wishes of the child as to his custodian, and the mental and physical health of all individuals involved.¹² These rules explicitly establish considerations to guide judges' interpretation of the standard. Some intermediate rules name factors; others establish presumptions about certain factors. A legal presumption is "a rule of convenience based on experience or public policy or as a course of action that may be taken without proof."¹³ Presumptions are state-specific rules of thumb or guidelines based upon understandings of what is usually within children's interests. They may vary in strength, but they usually support a default generalization judges rely upon in the absence of contrary evidence. Intermediate rules can vary from considerations that seem implicit, such as the factors provided in the UMDA, to more complex considerations, such as which parent is more likely to cooperatively facilitate the child's relationship with the noncustodial parent¹⁴ or the presence of domestic violence in a household.¹⁵

The state-by-state variety of intermediate rules is partially due to differences in values throughout the country. It is also partially the result of the independent evolution of doctrine within individual state court systems. Family law in the U.S. differs not only by state code but also by unique precedent developed in each state's courts.¹⁶ Though most state's codes specify intermediate rules, case law establishing how factors should be weighted or interpreted also

¹² National Conference of Commissioners on Uniform State Laws. (1970). Uniform marriage and divorce act. § 402

¹³ Buehler, Cheryl, and Jean M. Gerard. "Divorce Law in the United States: A Focus on Child Custody." *Family Relations*, vol. 44, no. 4, 1995, p. 441

¹⁴ This intermediate rule, a 'Friendly Parent' Provision, exists in forty-two states. Saunders, Daniel G, Ph.D. State Laws Related to Family Judges' and Custody Evaluators' Recommendations in Cases of Intimate Partner Violence: Final Summary Overview Submitted to the National Institute of Justice, U.S. Department of Justice, March 2017 p. 2

¹⁵ Saunders, Daniel G. p. 3

¹⁶ Fineman, Martha. *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*. Routledge, 1995. p. 29

contributes to the variation. There is a wide breadth of ‘best interests’ interpretations available to family court judges. Judges may base decisions upon a variety of interpretations by courts within their state or the opinions of courts in other states. The variety of intermediate rules, in and of itself, demonstrates the problem of indeterminacy. There is a clear need for specification, yet efforts to specify the standard take varied directions.

Intermediate rules prompt consideration of non-constitutional factors, authorizing judges to look outside the law and into society. With children mentioned nowhere in the Constitution, judges may find scientific or cultural norms useful in order to establish what is generally conducive to positive child development. The most widely influential scientific signpost to which intermediate rules conform is the research of Joseph Goldstein, Anna Freud, and Albert Solnit in three publications: *Beyond The Best Interests Of The Child* (1973,) *Before the Best Interests Of The Child* (1979,) and *In The Best Interests Of The Child* (1986).¹⁷ Based upon their findings about childhood development, Goldstein, Freud, and Solnit recommend “that custody should be decided swiftly, irreversibly, and without court-imposed visitation rights to the noncustodial parent, thus enabling the child to have a stable, undisturbed relationship with one adult person.”¹⁸ Two common intermediate rules the research of Goldstein, Freud, and Solnit supports are primary caretaker preferences (preferences for the parent who has spent more time

¹⁷ Spinak, Jane. “When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate.” *Family Law Quarterly*, vol. 41, no. 2, 2007, pp. 393–411. *JSTOR*, www.jstor.org/stable/25740616.

¹⁸ Goldstein et al., *Beyond the Best Interests of the Child* (cited in note 2); Joseph Goldstein, Anna Freud and Albert J. Solnit, *Before the Best Interests of the Child* (1979); Joseph Goldstein, Anna Freud, Albert J. Solnit, and Sonja Goldstein, *In the Best Interests of the Child* (1986).

with the child)¹⁹ and psychological parent preferences (preferences for the parent who has developed an emotional parent-child bond with the child.)²⁰

While relatively straightforward presumptions such as primary caretaker preferences may come down to a dispute of determinable facts, complex intermediate rules do not always make the best interests standard more determinate. Take for example a rule that requires judges to consider the presence of domestic violence in the household as a factor in determination of the child's best interests. The mere presence of domestic violence within a household does not, in and of itself, inform a clear singular course of action. Furthermore, a judge considering domestic violence as an intermediate factor may be influenced by social norms surrounding gender roles, functional inequality and power structures.

Family law scholar Martha Fineman discusses the influence of cultural norms in law, writing, "law is a crude and limited device and is circumscribed by the dominant ideologies of the society in which it is produced." Classification, "the process whereby facts are given legal meaning... relies on broad generalizations about groups or classes of things and people."²¹ Fineman claims that facts classified for legal purposes bear the residue of dominant social ideologies. Judges' potentially prejudicial opinions bear this residue. The residue of dominant social ideologies may offer useful scaffolding to clarify the ambiguities of more complex intermediate rules.

Furthermore, complex intermediate rules that create additional ambiguity may increase the potential for manipulation of the speculative 'facts' of a case. Elster discusses the potential for strategic manipulation in terms of intermediate rules and bargaining power. A vague best

¹⁹ Elster, Jon, p. 11

²⁰ Buehler, Cheryl, and Jean M. Gerard. p. 441

²¹ Fineman, Martha. p. 18

interests standard, unweighted by intermediate factors, may invite protracted litigation. The parent with greater financial ability may draw out the dispute until the other party's resources are exhausted in order to gain an advantage. Adding complex intermediate rules to the standard can create unintended bargaining incentives, increasing its susceptibility to manipulation by opportunistic litigants.

Friendly Parent Provisions can Create Differentials in Bargaining Power, Contributing to the Indeterminacy Problem

'Friendly parent' provisions, complex intermediate rules added to clarify the best interests standard, may often create unintended differentials in litigants' bargaining power. These presumptions give priority to whichever parent appears more willing to facilitate contact and visitation with the other. They may exacerbate the power dynamics of abusive relationships by unfairly disadvantaging a parent seeking custody in order to protect a child from an abusive partner. For example, Ohio family courts follow a 'friendly parent provision' and may award joint custody even where both parents do not seek shared parenting responsibilities.²² State laws such as Ohio's which presume joint custody is in a child's best interests and regard parental 'cooperativeness' as a positive factor may pressure a victimized parent into agreeing to joint custody, so as to not risk losing any form of custody.

²² "If at least one parent files a pleading or motion... and a plan for shared parenting... and if a plan for shared parenting is in the best interest of the children and is approved by the court... the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order" 31 Ohio Rev. Code Ann. § 3109.04 Allocating parental rights and responsibilities for care of children - shared parenting.

Custody law scholars discuss the potential for strategic manipulation under friendly parent provisions in states such as Ohio, where courts consider parental cooperativeness a positive intermediate factor. Friendly parent provisions are intermediate factors to the best interests standard in forty-two states.²³ In the twelve states with friendly parent provisions that presume joint custody is better for children,²⁴ family law scholar Jan Hagen argues that parents who don't want joint custody may “*ipso facto* reveal themselves as not fit for sole custody either” which “creates a dangerous incentive for strategic behavior.”²⁵ Parties litigating for joint custody who may appear ‘friendlier’ and therefore more fit gain an advantage, while parties litigating for sole custody, even if only to protect their child from an abusive spouse, are disadvantaged. A parent who believes the other to be dangerous is discouraged from litigating for sole custody. At the same time, “the more ‘unfit’ the parent requesting joint custody, the more bargaining leverage that parent gains” for their ‘cooperativeness.’²⁶ Custody law scholar Richard Garner adds, “[i]f people are indeed litigating for joint custody [i.e., if one parent demands joint custody against the wish of the other], they are generally not likely to be candidates for it.”²⁷ Friendly parent provisions that may be easily manipulated can lead to custody decisions that are not in children’s best interests.

The more indeterminate the standard, the greater the role strategy may play in litigation. If one accepts the premise that the best interests standard alone often cannot produce finely-tuned results, differentials in litigants’ bargaining power become critical. Some individuals will always

²³ Saunders, Daniel G, p. 2

²⁴ *Id.* p. 2

²⁵ Hagen, Jan L. ‘Proceed with Caution: Advocating Joint Custody’ Social Work, Vol. 32, No. 1 Oxford University Press (January–February 1987) p. 27

²⁶ Elster, Jon. p. 6 fn 22.

²⁷ Gardner, Richard A. Joint Custody is Not for Everyone, Joint Custody and Shared Parenting 63, p. 70 (1984)

be inclined to take advantage of the standard, especially where the stakes are high and the standard is vague. Considering parents' frequently substantial investment in the outcome of custody disputes, complex and manipulable intermediate rules can exacerbate rather than mitigate the indeterminacy problem.

Domestic Violence Provisions can add Ambiguity, Contributing to the Indeterminacy Problem

While intermediate rules can make the standard more determinate, they can also introduce additional ambiguity. They may produce unintended consequences when combined or force courts to consider complex variables without sufficient protocol. One intermediate rule that can contribute to the standard's indeterminacy is the consideration of domestic violence in the household. Some form of this intermediate rule exists in every state.²⁸ Most states, however, leave it up to judges to determine what inferences to draw from domestic violence as a factor. A minority of states that have friendly parent provisions, eight, make exceptions in cases of domestic violence (i.e. if a parent is a victim of domestic violence then they are exempt from the friendly parent provision, so as not to be coerced into 'cooperative' litigation behavior.)²⁹ However, the majority of states with friendly parent provisions, thirty-four, do not include exemptions for victims of domestic violence. A 2017 report commissioned by the U.S. Department of Justice finds that "even in jurisdictions with a presumption that custody should be awarded to the non-abusive parent, a 'friendly parent' provision tends to override this

²⁸ Saunders, Daniel G. p. 3

²⁹ *Id.* p. 3

presumption.”³⁰ Even where domestic violence is specified as a factor, the intermediate rule itself does not necessarily compel a specific approach or sensitivity to the issue. A parent who is a victim of domestic violence may be forced to agree to joint custody and cooperate with an abusive partner under friendly parent provisions in states that favor joint custody.

Scholars also note that factors such as domestic violence are “difficult to verify, and courts are often ill-equipped to separate valid claims from those that are weak or false.”³¹ Taking into account the cultural, in addition to the individual biases that play into applications of complex intermediate rules, one can see how such rules can actually exacerbate the indeterminacy problem. A judge who sympathizes with survivors of domestic violence may consider the issue by recognizing the value of giving custody to the victimized parent and granting an order of protection against the perpetrator. A judge who does *not* may consider the issue by deeming the home unsafe and removing the child.

In *Nicholson v. Scopetta* (2004)³², the Court of Appeals of New York (the highest court in the state) addressed the ambiguity of domestic violence provisions. The court established an interpretation of the provision sympathetic to victims of domestic violence. The Court of Appeals assessed whether the Association for Children's' Services (ACS) could remove children from battered mothers solely for having exposed their children to domestic abuse. The case addressed three related questions: Whether the sole allegation that a child had witnessed domestic abuse against a caretaker could constitute ‘neglect’, whether this would constitute ‘danger’ or ‘risk’ to the child's ‘life or health’ and whether this alone could be grounds for ACS to

³⁰ Saunders, Daniel G. p. 2

³¹ Elizabeth S. Scott & Robert E. Emery, Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard, 77 *Law and Contemporary Problems* 69-108 (2014)
Available at: <https://scholarship.law.duke.edu/lcp/vol77/iss1/4> p. 70

³² *Nicholson v. Scopetta*, 820 N.E. 2d. 840, 843 (N.Y. 2004).

conclude that removal would be ‘necessary’ or ‘in the child's best interests.’³³ Child neglect is usually ambiguously defined in state courts. (In Section 4 I will discuss how neglect is easily conflated with poverty.) The ambiguity of child neglect allows for judges to define neglect according to their own interpretations. The court in *Nicholson* addressed this ambiguity, holding that merely exposing one’s child to abusive conduct to which one is victim could not constitute neglect. The court held that proof of neglect would require a showing of actual harm or imminent harm at the hands of the caretaker.³⁴ The court also held that repeatedly exposing a child to abuse without awareness of the potential for harm could constitute neglect, but that a ‘reasonable and prudent’ parent might not be able to act to protect themselves or their child for fear of exacerbating the violence.³⁵

The New York Court of Appeals in *Nicholson* addressed a complex intermediate custody rule which specified a factor for consideration, domestic violence, yet introduced ambiguity around how the factor should be considered. The decision established a protocol attuned to the particular situation of battered mothers. Yet, in most states, the manner in which domestic violence is considered is left fully up to the court and the outcome of a custody battle for a victim of domestic violence may vary significantly depending on the judge assigned to the case. For example, Ohio establishes a presumption that domestic violence is contrary to a child’s best interests but does not specify what (if anything) a court should do if the victimized parent lives with the perpetrator and would require assistance to secure safe and independent housing.³⁶

³³ N.Y. Family Ct. Act §§ 1022, 1024, 1027, N.Y. Family Ct. Act §§ 1028, 1052(b)(i)(A)

³⁴ *Nicholson v. Scoppetta*, 820 N.E. 2d. 840, 843 (N.Y. 2004) at 849.

³⁵ *Id* at 363.

³⁶ “In determining the best interest of a child pursuant to this section... the court shall consider all relevant factors, including, but not limited to... Any history of, or potential for, child abuse, spouse abuse, other domestic violence.” 31 Ohio Rev. Code Ann. § 3109.04 Allocating parental rights and responsibilities for care of children - shared parenting.

Could a Coin Toss Remedy the Indeterminacy Problem?

Elster claims that the problem of indeterminacy cannot be legislated away merely by adding intermediate rules to the best interests standard. While he concedes that some rules are relatively more effective than others, he argues that many critical facets of any potential custody outcome are universally unknowable. In many cases, Elster correctly argues that it is impossible to establish a rational basis for a finding of what would be in any given child's best interests. This is due both to the exhaustive breadth of factors a judge *might* consider and to the difficulty of assessing these factors from an objective standpoint. While in theory, intermediate rules should clarify the vague best interests standard, they may also add ambiguity or create strategic incentives in combination with other rules. Furthermore, a rule might benefit certain individuals while imposing unintended consequences upon others, promote efficiency at the expense of ethical procedure or prompt a consideration of factors the judge lacks adequate means to assess.

Additionally, parents often experience difficulty accurately demonstrating their fitness to the court in the midst of divorce proceedings. Judith Wallerstein, an influential divorce psychologist, discusses the 'diminished capacity to parent' individuals experience during a divorce. Due to the stress of the process judges may not gain an accurate picture of parenting ability during divorce litigation.³⁷ After surveying several barriers to unbiased custody adjudication, Elster claims that fair decision-making under any discretionary standard, with or without intermediate rules, is usually outright impossible.

³⁷ Wallerstein, J. S., & Kelly, J. B. (1980). *Surviving the breakup: How children and Parents Cope With Divorce*. New York Basic Books.

The best interests standard, Elster concludes, belongs to a category of indeterminate legal standards which govern impossible decisions yet are rationalized as workable because legal institutions have a vested interest in affirming (or producing) the legitimacy of the law.³⁸ Judges will often inevitably rely upon non-child factors such as the greater implications of a decision or the message it sends, the character or strategic tactics either party exhibits during litigation, or incidental personal preferences. Elster argues that the standard's vulnerability to individual bias often leads to an expensive, time-consuming, and irrational decision-making process, ultimately more emotionally and financially costly than it is productive. The emotional toll of divorce litigation Wallerstein discusses may cause more harm to parents and children than the outcome of divorce litigation is worth. Rather than fine-tuning the vague best interests standard with specific intermediate rules, Elster proposes *doing away with a discretionary standard altogether*.

Elster endorses a hypothetical posed by Mnookin: if neither parent is deemed unfit then custody could be decided by coin toss rather than litigation. Elster argues, "random choice is appropriate when other criteria would force us to compare the intrinsic worth of persons... Although the best interest analysis ostensibly scrutinizes the mother and the father only with respect to their fitness for custody, it is easily understood as a judgment on their worth more generally."³⁹ Elster argues that this shift from consideration of fitness for custody to judgement of personal worth, a function of the indeterminacy problem, renders the best interests standard more detrimental than beneficial to litigants.

³⁸ Elster, Jon, p. 29

³⁹ Elster, Jon, p. 43

Elster claims that resolving custody disputes with a coin toss instead of tedious litigation that introduces opportunities for bias and strategy would produce equally just results in all but a small minority of cases in which there are reasonably discernible differences in parental fitness. Furthermore, the immediacy of a coin toss makes it procedurally best for children as custody litigation causes children emotional harm. While the coin toss, as Mnookin claims, would “deprive the parents of a process and a forum where their anger and aspirations might be expressed” and that “symbolic and participatory values of adjudication would be lost by a random process”⁴⁰ Elster emphasizes that such process costs are often the *only* difference between random selection and costly litigation. Elster claims that arguing for the process ‘benefits’ of litigation comes “dangerously close to arguing that it is better for something other than justice to be done and seen than for justice to be done but not seen.”⁴¹

Elster’s coin toss heuristic is an extreme hypothetical intended to demonstrate a point (that in many cases the standard’s indeterminacy renders it unproductive) rather than propose a solution. Elster is a theorist of human rationality, not a family court attorney or judge. Any family court attorney or judge would likely argue that to replace their positions with a single coin-tossing staff member in divorce custody cases would be impossible and/or unethical, and I would agree. However, let us momentarily take the coin toss solution as a serious proposal. If we replace the best interests standard with a coin toss in divorce custody cases and this indeed proves fair, it would demonstrate the extent of the indeterminacy problem. The standard would be shown to be so indeterminate that it might as well be replaced by random selection. Indeterminacy in divorce custody cases would appear to be the extent of the unfairness.

⁴⁰ Mnookin, Robert. P. 39

⁴¹ Elster, Jon. p. 36

In a majority of divorce cases Elster claims that both parents are, as far as a court could reasonably determine, equally fit, and in these cases a coin toss would be fair. Contrary to Elster's claims, I am inclined to believe that there is more to procedural fairness than mere appearances. However, setting procedural fairness aside for a moment, what might be fair about a coin toss in divorce custody cases would be distinctly unfair in child welfare cases. Substitute a coin toss for the best interests standard in the child welfare system, in child protective proceedings, and we shall see that the source of unfairness in this context is more than mere indeterminacy. Applying the coin toss proposal to child protective proceedings illustrates the difference between the indeterminacy problem in divorce custody cases and the indeterminacy problem in the child welfare system.

The reason that a coin toss might be a fair solution in divorce cases is that the parties vying for custody are both parents who are for all discernable purposes equally fit to care for a child. Of course, there are cases in which parents are not similarly situated. Differentials in litigants' bargaining power, such as the power dynamics of abusive relationships, further inhibit fair applications of the best interests standard. However, Elster's coin toss hypothetical concerns the majority of divorce custody cases, in which he claims both parents are similarly situated and equally fit. Because both parents are equally fit and similarly situated, tossing a coin eliminates costly and detrimental litigation at little cost to fairness.

Elster's coin toss hypothetical exemplifies the extent to which indeterminacy is a problem in divorce custody cases: the potential for individual bias is so great that in the face of process costs, divorcing families might as well forgo litigation. In the following sections, I will discuss the best interests standard in the child welfare system. In in child protective proceedings,

the indeterminacy of the best interests standard allows for greater harm than the incidental, individual bias Elster argues it permits in divorce cases. In child protective cases, the parties are not similarly situated, equally fit parents. Due to the differences in litigants and the nature of the bias at hand in child protective cases, a coin toss would not be an adequate solution. The inadequacy of the coin toss hypothetical illuminates differences between divorce and child protective custody cases, which render a vague, indeterminate standard a far greater danger in the child welfare system.

2. The Individualization of the Child: From Property to Victimized Individual

In this section, I will explore how the child is constructed in the individualistic terms of the U.S. legal system, informing applications of the best interests standard in the child welfare system. The child as a legal subject is constructed as an *individual* and *victim*. U.S. legal discourse understands the victimization of the child independently from the victimization of parents or the family unit. This narrative is detrimental to families involved in the child welfare system where parents are understood in contrast to child victims as perpetrators by default. Focused upon the individual victimized child, child welfare cases treat parents punitively. This focus upon parental misconduct simplifies the cause of harm as an individual cause, independent from larger societal forces. To only focus upon the child as a victim is to ignore that the conditions of the child's life depend upon the conditions of the family. While children *are* individuals with independent needs, the victimization of the individual child ignores the interdependence of children's and families' needs and the dependence of families' needs upon

access to social resources. The legal construct of the child as an individual victim obfuscates the larger picture of the harm at stake in the child welfare system, harm that implicates not only individuals but society at large.

In Section 1 I discussed the indeterminacy problem as a function of individual bias in divorce custody cases. This section will discuss child custody and the best interests standard in the context of the child welfare system through the lens of the individual victimization of the child. The following sections will argue that the indeterminacy problem in the child welfare system poses a greater threat than the mere influence of individual bias; the indeterminacy problem in the child welfare system enables cultural, historic patterns of harm.

The Best Interests Standard is the Same in Child Welfare and Divorce Cases, but the Court Procedure is Different

While the controlling legal standard, the ‘best interests of the child,’ is the same in divorce custody cases and in the child welfare system, child protective proceedings (cases in the child welfare system) involve different procedure. Child protective proceedings are initiated by a report of abuse or neglect to a child protective agency. When a state child protective agency elects to pursue a child welfare investigation in court a series of hearings commences. It is worth noting that state agencies do not initiate a court action in every case. They may work with families to deter court proceedings. This process may involve referral to services, agency supervision “or even requesting - with an implied threat of court action if the parent refuses - that

the parent agrees to a ‘safety plan,’ which can include changing the child's physical custody.’⁴²

However, before a child is placed in foster care, there is a standard procedure which agencies are, at least on paper, required to follow. Though the child welfare court process varies by state, there are certain standard procedural steps.

A child protective case begins with a court-ordered investigation. The agency may file an ‘emergency removal order,’ alleging imminent danger to the child, asking the court to temporarily place the child in state custody before making its decision. In a preliminary hearing, the parents and agency present evidence to a family court judge who decides whether the child will stay at home or in state custody before the trial. Next, in a fact-finding hearing, the judge determines whether abuse or neglect has occurred. This is followed by a dispositional hearing, in which the judge determines whether to place the child in state custody (foster care) or to return the child to their family home. If the child is placed in foster care, the agency and the judge determine a visitation schedule and a case plan which parents must follow in order to be reunited with their children. A case plan often includes mandatory participation in government service programs such as vocational training or parenting classes. The court conducts review hearings to monitor the parent’s participation in the case plan. After twelve to eighteen months, the court holds a permanency hearing, in which the judge may reunite the family or terminate parental rights. In a final hearing, if the judge decides to terminate parental rights, the child is permanently placed in state custody until they ‘age out’ (when the child reaches eighteen in most states) or are adopted.⁴³

⁴² Gupta Kagan, Josh. *Rethinking Family Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. Chi. L. Rev. 743 (2018) p. 14

⁴³ Children’s Bureau. 2016. *Understanding Child Welfare and the Courts*. Washington: U.S. Department of Health and Human Services, Administration for Children and Families.
<https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf>

Children are Constructed as Individual Victims As Legal Subjects in the Child Welfare System

Section 1 examined the indeterminacy of the best interests standard from the standpoint of the individual biases of judges. Another aspect of the standard's indeterminacy is the ambiguous position of the child as a legal subject. While children cannot independently define their own interests, their interests are presumed to be independent from the interests of their families. Interests, like rights, are understood in an individualistic legal system as exclusive properties of individuals. Dominant U.S. political thought constructs citizens as individuals in relation to society. Individual rights are the principal benefit this relationship begets. Because the relationship is between the individual and society, rights are tied to individuals, not groups.⁴⁴ Thus, the individual interests of the child are more easily understood in U.S. legal discourse than the collective or relational interests of family units.

It is more difficult for judges in an individualistic legal system to recognize the gravity of a child's interest in the continuance of family relationships, in remaining within their family home, than, for instance, a child's projected interest in living in a two-income household. The fundamentally individual construction of rights is complicated by children who are intrinsically, socially and legally considered dependent but viewed *independently* in their capacity as rights-recipients. Childrens' dependency is incorporated in their characterization as victims,

⁴⁴ Eekelaar, John. 'Self-Restraint: Social Norms, Individualism and the Family' (2012) 13 Theoretical Inquiries in Law 75

passive subjects in need of protection. Yet dependency is left out of the characterization of children's interests as independent and individual. Because children cannot directly articulate their interests, their interests are instead subject to determination by a largely indeterminate standard. These interests are easily molded by the norms of the legal system. Legal individualism minimizes considerations of parent-child relationships in judicial 'best interests' calculations.

In most legal disputes, 'interests' can be understood straightforwardly; a party's interests are synonymous with the party's desires. Yet 'best interests' are not always synonymous with express desires, even for adults. Certainly, adult litigants are capable of having desires that do not align with what would be best for them. However, because adults are presumed to be capable of recognizing this potential disparity, for better or for worse, they are in most cases at liberty to define their own legal interests. Children, on the other hand, do not necessarily possess the same capacity for differentiation. Children may not be able to reliably articulate their desires, and their desires, if articulated, cannot reliably be called their interests. While thirty-three states consider the express desires of children in determining their best interests (intermediate rules in these states specify consideration of the child's wishes,) the remaining seventeen states do not explicitly consider children's wishes.⁴⁵ Recognizing differences between adults and children, courts usually do not consider the express interests of children and the 'best interests' of children as being synonymous.

This is not to say that children are incapable of knowing what would be best for them or to discount the claim that often in fact children know more about their own best interests than adults. However, children and adults are treated differently under the law due to intrinsic

⁴⁵ Buehler, Cheryl and Gerard, Jean M. p. 448-457

differences such as developmental capacity, as well as situational differences such as the child's dependency within the social institution of the family. Because it would be frequently detrimental to children and socially considered morally irresponsible, children are not granted the same liberty as adults to define their own legal interests.

The ambiguity of children's legal position presents a challenge to family courts. Though constructed as independent victims, children are both functionally dependent in the sense that they rely upon caretakers and also discursively dependent in the sense that they rely upon adults to define their legal interests in court. Nonetheless, children are constructed as independent legal subjects whose interests, once defined, have a fundamental influence upon the outcome of custody disputes. Because the task of determining a child's best interests is so difficult, in contentious litigation, courts often appoint attorneys or trained volunteers as guardians ad litem to participate in court on the child's behalf. Guardians ad litem are solely responsible for advocating for the child and represent the child's individual independent interests. Guardians ad litem thus embody the legal construction of the child as a victimized individual.

Historical Context Explains the Individualization of the Child

The appointment of guardians ad litem became more prevalent across states in the 1970s, after a landmark Supreme Court case, *In Re Gault* (1967) and the enactment of the the Child Abuse Prevention and Treatment Act (CAPTA) federally in 1974. The 1970s saw an immense increase in pressure upon the child welfare system. Family law scholar Josh Gupta-Kagan notes

the number of reports of child abuse and neglect “increased eightfold between 1963 and 1980.”⁴⁶

Gupta-Kagan argues that the passage of CAPTA and *Gault* initiated transformations of the legal status of the child and the child welfare system into their modern forms: the child constructed as an individual victim and the bureaucratic institution that supports this construct.⁴⁷

Though it did not not directly pertain to to the child welfare system, the *Gault* decision influenced the individualization of children as legal subjects in the child welfare system. The Supreme Court in *Gault* held that a minor facing juvenile delinquency charges was entitled to counsel and that the minor’s parents were entitled to notification of the charges.⁴⁸ Child welfare and juvenile justice scholar Jane Spinak notes the connection between *Gault* and the individualization of children’s interests via guardian ad litem representation: “While the Supreme Court has never held that children subject to state intervention as victims of child maltreatment are similarly entitled to counsel, only seven years after the *Gault* decision, in 1974, [with the passage of CAPTA,] the federal government began requiring states to provide children with some form of representation of their interests in child protective proceedings as one of the conditions of drawing down federal foster care funding.”⁴⁹ Gupta-Kagan contextualizes the *Gault* decision similarly, arguing the “watershed decision in *Gault* denounced the absence of due process in family-court trials and required dramatic reforms - “constitutional domestication,”⁵⁰ transforming the child welfare system in addition to the juvenile justice system.

The effects of *Gault* were wide-reaching for children as legal subjects. While there is no similar Supreme Court case in child welfare law, Spinak and Gupta-Kagan argue that the passage

⁴⁶ Gupta-Kagan, Josh p. 770

⁴⁷ Gupta-Kagan, Josh p. 766

⁴⁸ *In Re Gault* 387 US 1 (1967)

⁴⁹ Spinak, Jane. p. 395

⁵⁰ Gupta-Kagan, p. 766 (quoting *In Re Gault*, 387 US at 22.)

of CAPTA was influenced by the ‘constitutional domestication’ *Gault* heralded. In addition to conditioning federal funding upon states’ appointments of guardians ad litem,⁵¹ CAPTA also expanded the reach of child protective agencies by increasing their funding, and conditioning state funding upon passage of laws requiring professionals to report suspected child abuse or neglect. Gupta-Kagan writes, “the child protection administrative state grew increasingly complex in the years after *Gault*.”⁵² The expansion of the child welfare system occurred simultaneously with the formalization and increase of legal procedure solidifying the construction of the child as an individual victimized legal subject. Both the expansion of the child welfare system and the victimized individual construct of the child shape mobilizations of the best interests standard in present day child protective proceedings.

The individualization of the child can be seen in contrast to the British common law doctrine of coverture, a predecessor to U.S. family law jurisprudence. Under the doctrine of coverture, children were legally considered property, devoid of rights, legal protections, or legal recognition of their humanity. From the emergence of U.S. jurisprudence through the early nineteenth century, U.S. courts relied upon the doctrine of coverture. Under coverture, the law understood the household hierarchically; husbands, as heads of the house, owned all marital property, including children. Upon entering a marriage, women gave up the right to own property and in the event of a dissolution of the marriage contract men automatically gained custody of any children of the marriage. Fathers, as sole property owners of the household gained custody automatically in divorce. A custody dispute was therefore a question of ownership resolved simply by the fact that only one party could legally have property rights.⁵³

⁵¹ CAPTA § 4(b)(2)(G), 88 Stat at 7, 42 USC § 5106a(b)(2)(B)(xiii)

⁵² Gupta-Kagan, Josh. p. 770

⁵³ Fineman, Martha p. 30

After the doctrine of coverture began to lose influence in the 1880s but prior to the widespread adoption of the best interests standard in the 1970s, family courts applied the ‘tender years’ doctrine.⁵⁴ The tender years doctrine allocated custody in divorce to mothers, who were considered more fit to care for young children of ‘tender years’ by virtue of their gender. Based in gender-role stereotypes, the doctrine served children’s interests only incidentally as societal gender roles more frequently render women more experienced caretakers. While the tender years doctrine employed gender-role stereotypes, it allegedly did so on the basis the child’s wellbeing, only presuming that women are better parents. In this sense, the tender years doctrine can be understood as a precursor to the child-centered but gender neutral best interests standard, only it codified a particular gendered interpretation of these interests. The ‘tender years’ doctrine established a maternal preference in name of children’s interests before these interests became the fundamental named consideration in custody disputes. Over the course of the the 20th century the period during which courts presumed a child would be better cared for by its mother expanded from infancy to the teen years.⁵⁵ Yet by the turn of the century these statutes which discriminated explicitly on the basis of sex were widely struck down under equal protection challenges. The modern best interests standard emerged in their place.

As the child welfare system expanded in the 1970s under the best interests standard, the child gained a legal status opposite from that of property (as under the doctrine of coverture.) The child came to be constructed as an independent individual legal subject. However, the

⁵⁴ *Id.* p. 77

⁵⁵ Emery, Robert E., et al. “A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System.” *Psychological Science in the Public Interest*, vol. 6, no. 1, 2005, pp. 1–29. *JSTOR*, www.jstor.org/stable/40062305. p. 19

victimization of the child as an independent legal subject obscures the interdependence of families and the historic, cultural harm families are subjected to in the child welfare system.

The Individual Victimization of the Child Presupposes a False Conflict of Interests Between Children and Parents

In the modern child welfare system the interests of the individualized child are constructed in opposition to the rights of parents. This conflict is articulated throughout both liberal and conservative political rights discourses. The expansion of parental rights is often politicized as an item on the conservative agenda and aligned with the expansion of religious liberties.⁵⁶ Strangely, in the related legal realm of abortion and contraceptive rights, the rights of parents are traditionally aligned with a liberal platform. The difference between child-rearing debates and abortion/contraception debates is that in the latter the ‘child’ who cannot speak, whose interests must therefore be defined by proxy—who is spoken-for via politicized construct—is an unborn fetus. Yet the central ‘conflict’ of rights in these two areas of rights discourse (rights concerning *how* to raise children and rights concerning *whether* to raise children) is the same. Whether or not a fetus may rightly be considered a child or human subject, the fundamental liberty interest asserted on its behalf is the ‘best interests of the child.’ Whether the subject is a living child or fetus, both debates pit its alleged ‘best interests,’ constructed independently from the interests of its parents, against its parents’ privacy rights. (In the following section, I will explore parenting rights as privacy rights. Parenting rights are part of

⁵⁶ Zimmerman, Erik M. ‘Defending the Parental Right to Direct Education: Meyer and Pierce as Bulwarks Against State Indoctrination’ 17 Regent U.L. Rev. 311, 318 (2005)

a non-individual form of privacy, family privacy, which entails necessary interference with children.)

However, insofar as (potential) parent and (potential) child might be considered separate individuals, their ‘individual’ interests are mutually constituted. For example, a parent’s decision to have or not to have a child likely rests upon their ability or lack of ability to provide care. Ability, which informs the potential parent’s interests, also plays a major role in the theoretical stake the potential child would have in being born. To recognize this is to recognize that the interests of parent and child, potential or actual, are mutually constitutive. The legal construction of the child as a victimized individual obscures this mutuality.

When the rights in question are not abortion rights but parenting rights, conservatives are in favor of their expansion. Conservatives have won expansions of parenting liberties where these liberties are aligned with religious freedom. (In such cases, parenting rights are arguably actually incompatible with children’s interests. See *Wisconsin v. Yoder* expanding parental rights at the expense of children’s access to public education.)⁵⁷ However, the liberal counter-motion to minimize parental rights in favor of an ‘individual/victim’ construct of the child-in-need-of-protection furthers a simplistic narrative at the expense of harm to families. What courts fail to recognize in both liberal and conservative interpretations of the ‘conflict’ of parents’ and children’s rights is how the interests of the (potential) parent and (potential) child are not individual interests. They are only misrepresented as such via dominant legal and political norms. The individualistic legal system which presumes parent and child to be in conflict privileges the interests of the individualized child over the rights of its parents,

⁵⁷ *Wisconsin v. Yoder* 406 US 205 (1972)

especially when these parents belong to demographics whose family privacy has historically been diminished.

**The State's Power to Intervene in Child Welfare Cases on Behalf of the Individual
Child Victim is a Function of its *Parens Patriae* Power**

The government's right to intervene in the private family realm on behalf of children is known as its *parens patriae* powers (latin for 'parent of the nation.'). *Parens patriae* powers evolved alongside the emergence of the modern child welfare system and construction of the child as a legal subject. Via *parens patriae* powers states assume responsibility for children in the place of parents who allegedly neglect or abuse parental responsibilities. States assume these rights and responsibilities generally held by parents as matter of public interest. *Parens patriae* powers allow states to take custody of children found by a court to have been neglected or abused. When a state child protective agency (or a private agency contracted by a state) removes children from their parents and places them into foster care the state can be said to be exercising its *parens patriae* powers.

In the early 1800s the role of the U.S. government expanded in the personal lives of citizens. Following this shift, the state began to intervene more frequently in children's lives.⁵⁸ In the early 1900s, *parens patriae* powers expanded as states assumed increasing responsibility for children. The first example of a state exercising its *parens patriae* power in U.S. history is the

⁵⁸ *Id.* p. 708

1874 case of Mary Ellen McCormick, a child who suffered parental abuse.⁵⁹ McCormick's advocates were "initially compelled to approach the Society for the Prevention of Cruelty to Animals to secure her protection from abusive parents."⁶⁰ Legal and social work theorist Mary Kay Kisthardt explains, "The legal system that responded was one that was built on discretionary decision-making and the substitution of the court as parent."⁶¹

The legal system of the 1900s was comprised of state juvenile courts, established at the beginning of the century to deal with troubled youth. Juvenile courts also dealt with cases of child neglect. Family law scholar Mark Soler argues that the juvenile court system of the 1900s "embodied the doctrine of *parens patriae* and became its symbol."⁶² State intervention on behalf of neglected children is part of the larger a shift in child law in which children, once conceived of as property of fathers, became not full citizens but nonetheless independent individuals. The modern child welfare system is an outgrowth of the juvenile court and the authority to remove children is likewise representative of *parens patriae* powers.

In the following sections, I will discuss how state interventions into the family home encroaching upon family privacy are legitimized in the name of protecting children as victimized individuals. In Section 4, I will discuss poverty as a deeper, underlying cause of child neglect. Poverty is one of the main predictive factors of child neglect⁶³ and the sole issue in 74.9 percent

⁵⁹ Kisthardt, Mary Kay, Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases (October, 27 2008). Rutgers Law Record, Vol. 30, No. 1, 2006 . Available at SSRN: <https://ssrn.com/abstract=1290612> p. 11

⁶⁰ NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, Child Maltreatment at <http://naccchildlaw.org/childrenlaw/childmaltreatment.html> (last visited Feb. 1, 2006).

⁶¹ U.S. Dept. of Health & Human Services, Admin. for Children & Families, *supra* note 29, at 6.

⁶² Soler, Mark et al. 'Representing Children in Juvenile Justice Proceedings. Representing the Child Client, P 5.1-5.119, (1988) p. 677

⁶³ Roberts, Dorothy *Shattered Bonds: Color of Child Welfare*. Perseus Books, 2002. p. 27

of child protective proceedings.⁶⁴ The construction of the individual victimization of the child at the hands of individual parents does not acknowledge poverty as a societal harm. I will discuss the impact of the dominant cultural narratives that portray poverty as evidence of individual failure rather than social harm in the child welfare system. The projection of guilt upon the individual parent constructed as perpetrator of the child's victimization diminishes social responsibility for poverty. This furthers the subjection of parents in the child welfare system to patterns of harm based in cultural, historic racism and classism.

3. The Individualization of Privacy and The Non-Interference Condition

In this section I will argue that the individualistic construction of privacy rights in U.S. jurisprudence weakens parenting rights. Parenting, as any parent can tell you, involves some of the the most difficult, significant and *personal* decisions one can make. From seemingly mundane choices of everyday family life to choices that have the power to alter a child's life, parenting decisions are fundamentally personal in the sense that they require more than merely weighing options and outcomes. Beyond practical calculations, parenting decisions evoke personal values and belief systems, draw upon past experiences and reflect cultural backgrounds. Accordingly, the freedom to make these decisions is one many hold dear. Parenthood may represent a core part of one's identity. One's stake in one's ability to make choices for one's child may be tied to the parent-child relationship, as an integral part of one's sense of self.

⁶⁴ Child Maltreatment 2017. Children's Bureau (Administration on Children, Youth and Families, Administration for Children and Families) of the U.S. Department of Health and Human Services
<https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf> p. ii

In custody disputes, otherwise non-critical parenting decisions attain a degree of significance beyond the scope of their immediate outcomes. Decisions such as which therapist a child should see⁶⁵ are real and common points of contention in expensive, protracted divorce court litigation. What motivates these conflicts is likely not the specific point of contention alone but more broadly the freedom to make the type of choice one deems fundamental to one's parenting role. In other words, parents not only have a stake in the content of their decisions (the specific care their children receive) but also in the freedom to make these decisions (the liberty to direct and administer this care as they see fit.)

However, the legal rationale for protecting this liberty is not the personal significance of parenthood as a relationship role. Parenting rights are protected via a well-established legal tradition protecting privacy. A strong precedent set by the Supreme Court regards privacy as a fundamental American liberty. Parenting rights, however, are protected by a weaker form of privacy, family privacy. Family privacy is weaker than individual privacy because it inherently interferes with children. I argue that there are two main conditions upon which privacy rights rest: non-interference and productive use. This section will focus on the non-interference condition: privacy rights are strengthened if their exercise exclusively impacts the individual rights-bearer. Family privacy is necessarily weaker than individual privacy because it fails to meet the non-interference condition.

⁶⁵ *Shoshanah B. v Lela G.*, 140 A.D.3d 603

Parenting Rights are Privacy Rights

While there is no explicit right to raise children in the Constitution (children are not mentioned) parenting rights are protected as fundamental liberties. The fundamental status of parenting rights is tied to the doctrine of privacy which protects the domain of individual households (separate from the domain of public civic life) from government intrusion.⁶⁶ The Supreme Court recognized parenting as a fundamental right in two foundational 1920s cases, *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925.) In *Meyer*, the Court invalidated a Nebraska law barring foreign language education under which an instructor teaching German had been convicted. The court held, “evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”⁶⁷ In *Pierce*, the Court affirmed the fundamental parenting liberty protected in *Meyer* by invalidating a state law that barred parents from enrolling their children in private schools. The Court held that such an act “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”⁶⁸ In *Meyer* and *Pierce* the Court protected the autonomy of parents to direct children's upbringing as a fundamental liberty.

The designation of parenting rights as a fundamental in *Meyer* and *Pierce* was imbued with renewed authority by the Court’s decision in *Troxel v. Granville* (2000). *Troxel* affirmed the status of parenting rights as fundamental and tied this status to the privacy of the family home.

⁶⁶ *Troxel v. Granville* (2000), 530 U.S. 57, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska* 262 US 390 (1923)

⁶⁷ *Meyer v. Nebraska* 262 US 390 (1923)

⁶⁸ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) at 534-535.

The Court in *Troxel* held, “There is a presumption that fit parents act in their children's best interests, there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children.”

⁶⁹ *Troxel* emphasized that parenting rights exist within a private sphere that should be fundamentally protected from undue state intrusion.

The fact that parenting-decisions-as-personal-decisions are legally protected as a matter of privacy seems at first a strange conflation of ‘personal’ and ‘private.’ While ‘personal’ may ring true as a description of the experience of parenting for most parents, ‘private’ may seem less tenable. One might expect that private matters would not leave the sphere of the home, affecting only the private individual in question. Yet parenting decisions affect children who are not the individual rights-bearers. Furthermore, parenting decisions often affect children’s lives outside of the sphere of home in public places such as schools. While parenting rights may be necessary and indeed personal, to characterize their personal and necessary nature as deriving from their ‘privacy’ rather than, say, the significance of parent-child relationships seems peculiar.

Many scholars understand the nature of parenting rights and the basis for their protection through the framework of responsibility rather than privacy. Political theorist Jeremy Waldron’s claim that “some rights are actually responsibilities”⁷⁰ illustrates this perspective on the nature of parenting rights. Waldron’s ‘responsibility rights’ are worthy of protection because they enable

⁶⁹ *Troxel v. Granville* (2000), 530 U.S. 57. (Citing *Parham v. J. R.*, 442 U.S. 584, 602, 61 L. Ed. 2d 101, 99 S. Ct. 2493) See also, Justice Stevens, Dissenting: “[T]he right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment... Parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest -- absent exceptional circumstances -- in doing so without the undue interference of strangers to them and to their child.”

⁷⁰ Waldron, Jeremy. DIGNITY, RIGHTS, AND RESPONSIBILITIES. *Arizona State Law Journal*; Spring 2011, Vol. 43 Issue 1, p. 1107

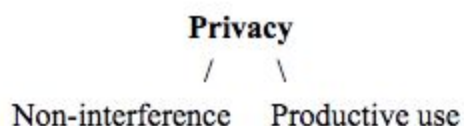
the rights-bearer to fulfill a responsibility beneficial to the public good. In the case of parenting rights, the responsibility of raising and caring for children is considered a public good which justifies the rights' protection. A primary caretaker intermediate presumption might be justified by a similar responsibility-based stance. The parent who had taken greater responsibility for the child in the past might be entitled to stronger parental rights i.e. the ability to take greater responsibility for the child in the future.⁷¹ In the following section, I will elaborate upon the implications of parenting as a responsibility right in discussion of the productive use condition.

Privacy may be a necessary aspect of the protection of parenting rights but privacy alone does not capture the nature of the right and the basis for its protection. Ethical claims such as the responsibility and relationship significance of parenthood are critical aspects of why parenting is (or should be) protected. Responsibility and relationship significance may be invoked in legal articulations of privacy, but within the individualistic U.S. legal system, these factors are not its defining characteristics.

Parenting Rights as Privacy Rights are Conditional

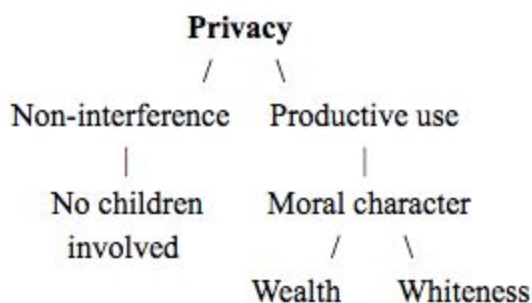
Like all privacy rights and many other fundamental liberties, parenting rights are conditional. They are not absolute but rather contingent upon conditions rights-bearers must meet. Many other constitutional rights are conditional; liberties that have the potential to harm others are often constrained by conditions in order to mitigate their potential for harm. Yet parenting rights are *necessary* weakened as a function of their conditionality.

⁷¹ "Devoting time to child care during marriage, perhaps at great costs to personal and professional development, would seem to create in the caretaker a prima facie right to custody. Custody would be a just reward for past devotion and sacrifice." Elster, Jon. p. 30



Conditions of privacy rights. The privacy right is contingent upon two conditions: non-interference and productive use. Privacy rights are strengthened by these conditions if they are met, diminished by them if they are unmet.

It helps to consider the conditions of privacy as having subconditions in order to understand how parenting rights are weakened. The conditions are more likely to be met (and privacy is more likely to be protected) if their subconditions are met. If unmet, their subconditions decrease the likelihood of conditions being met, weakening the privacy right. ‘No children involved’ is the subcondition of non-interference.



Sub-conditions of privacy rights. The privacy right is strengthened by the conditions below it if they are met, diminished if they are unmet. The top conditions (non-interference and productive use) are more likely to be met if the subconditions below them are met and less likely to be met if the subconditions below them are unmet. Note that the lowest subconditions (no children involved, wealth, whiteness) are relatively more fact-based than the higher conditions (non-interference, productive use, moral character.) The higher conditions are presumptions based upon the subconditions below them.

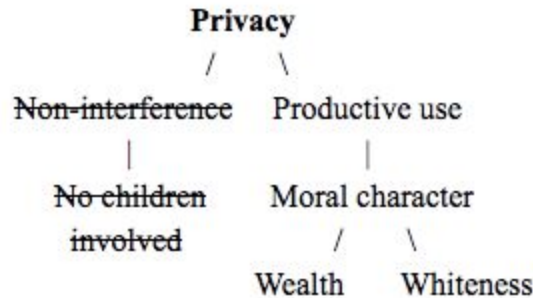
Parenting liberties are particularly conditional. So conditional, in fact, that scholar of law and anthropology, Khiara Bridges, argues they *do not exist for certain individuals*. The subcondition ‘no children involved’ is necessarily failed by parenting rights, as parenting rights necessarily implicate children. Interference with children is an intrinsic structural part of what parenting, by nature, entails.

In the following section I will define the productive use condition and argue that the privacy of parenting rights is also contingent upon this condition. Family privacy is rendered weaker yet for poor, often black mothers through this second unnecessary and detrimental condition. As Bridges argues, the productive use condition renders the privacy rights of poor mothers nonexistent.

Parenting Rights Necessarily Interfere With Children

Family privacy, the specific form of privacy which parenting rights belong to, is a more limited basis for protection than individual privacy. This is partially due to the inevitable failure of the first condition of privacy: non-interference. Parenting rights, unlike individual privacy rights, inevitably interfere with children. Parenting rights are conditioned by this inevitable impact because, while parenting rights pertain to decisions made by individual parents, the decisions parents make for their children cause direct intentional outcomes for children. While parenting choices may be recognized and protected as personal choices, they are not personal

choices in the sense of choices that one makes by and for oneself alone. Rather, they are ‘personal’ in the sense that they are choices one makes *within one’s intimate capacity to choose for another person*.



Family privacy. Children are necessarily and directly impacted by the exercise of parenting rights. Because family privacy, which protects these rights, necessarily interferes with non-rights-bearing children, the non-interference condition is unmet. Family privacy is necessarily weakened by the inevitable failure of the non-interference condition.

The failure of the non-interference condition is a fundamental part of the structure of parenting rights. The actions which family privacy protects impact children who lack comparable decision-making capacity to adult citizens, at least until they reach the age of majority and often afterwards. Children’s privacy, if at all protected, is directly infringed upon by the exercise of parenting rights. Children are so directly impacted by parenting rights that they may be considered second non-rights-bearing subjects of these rights. Due to the inevitable impact upon the second subject (the failure of the non-interference condition) there is greater potential for parenting rights to enable harm. This suggests a connection between non-interference and the flip

side of productive use, doing no harm. (I will discuss productive use and the presumption of harm in the following section.)

The higher potential for harm due to necessary interference with children is good reason for family privacy to be weaker than individual privacy. Family privacy is more vulnerable to state intrusion because children are generally more vulnerable than adults. They are more often in need of state protection. Because minors may be subjected to abuse or neglect by their parents who are responsible for protecting them, the state may exercise its *parens patriae* powers to assume responsibility for protecting children in the place of parents who abuse it. However, it is critical to make this distinction, to distinguish family privacy as a weaker form of privacy, when one considers the additional impact of the productive use condition, which diminishes and some cases extinguishes privacy rights.

Individual Privacy is Stronger than Family Privacy Because it Meets the Non-Interference Condition

A straightforward individual legal right to privacy is protected simply because its associated conduct occurs within the private sphere. Family privacy complicates this protection, because relationships and responsibilities are non-individual, non-negotiable parts of parenting. These key aspects of family privacy differentiate it from individual privacy, making it a more difficult right to protect.

One of the most foundational Supreme Court decisions that championed privacy rights is *Griswold v. Connecticut* (1965.) *Griswold* cited *Meyer* and *Pierce* in majority and concurring

opinions. However, while the justices referenced these foundational 1920s parenting rights cases, they did not acknowledge the fundamental differences between family privacy and individual privacy which render the rights they protected stronger than the rights protected in *Meyer* and *Pierce*. Privacy could, in *Griswold*, be tied to the straightforward connotation of a married couple's bedroom as a private space. In the private sphere protected in *Griswold* the actions of rights-bearers did not affect non-rights-bearers.

Griswold concerned the individual rights of two married, consenting adults to use contraception within the privacy of their home. The seven justices comprising the majority shared the opinion that the Constitution protects a right to privacy though they differed on which amendments this right could be derived from.⁷² Justice Goldberg, concurring though finding support in the Ninth rather than Fourteenth Amendment, wrote, "Of this whole 'private realm of family life,' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."⁷³ Here Goldberg ties privacy to non-interference. As Justice Goldberg's concurrence indicates, appealing to privacy in the sense of actions that do not affect others (non-interference) strengthens the constitutional protection of privacy rights.

The fact that the *Griswold* majority protected the couples' rights as fundamental despite the lack of consensus on their derivation demonstrates the strength of the individual privacy protected. *Griswold* offered what might be considered an unlikely degree protection to a right defined nowhere in the Constitution. The *Griswold* majority even went so far as to protect rights connected only indirectly to the 'private individuals' in question. Even though appellants in *Griswold* were medical personnel whose right to distribute contraceptives were not directly the

⁷² *Griswold v. Connecticut* 381 US 479 (1965)

⁷³ *Id.*

privacy rights of the married couple, Justice Douglas argued that to interfere with the physician's role would substantively interfere with the couple's rights. He argued that the conduct of physicians providing contraception must be protected by "peripheral rights"⁷⁴ (versus rights enumerated in the Bill of Rights.) The Court nonetheless found it necessary to protect these rights in order to give substance to a "right of privacy older than the Bill of Rights."⁷⁵ Despite its ambiguity the *Griswold* decision protected individual privacy with force.

Yet the privacy of individual adult actions protected in *Griswold*, contained within the physical home and unlikely to affect those outside of it, is fundamentally different from the privacy of families with children. Another case emblematic of the strengthening of individual privacy via non-interference is *Lawrence v. Texas* (2003.) The thrust of the 'individual' aspect of privacy present in *Griswold* and *Lawrence* and absent in *Meyer* and *Pierce* is that the private conduct in *Griswold* and *Lawrence* did not interfere with non-rights-bearers. The Court in *Lawrence* protected the rights of individuals to engage in intimate sexual conduct within the private sphere of the home. *Lawrence* cited *Griswold* and *Eisenstadt v. Baird* (1972) (expanding *Griswold*.) The Court held, "it is true that in *Griswold* the right of privacy in question inhered in the marital relationship. . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁷⁶ The family privacy of parenting rights protected in *Meyer* and *Pierce* stands in contrast to the individual privacy protected in *Griswold* and *Lawrence*. Because parenting privacy rights do not meet the

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Lawrence v. Texas* 539 U.S. 558 (2003) (Citing *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) at 453.

non-interference condition emphasized in *Griswold* and *Lawrence* they are necessarily weakened.

Individual privacy is constructed as a negative liberty (freedom from state intervention) which is easier to protect than the positive liberty formulation of family privacy, ‘the freedom to raise children.’ The negative liberty is contingent upon sphere: conduct need only occur within a private sphere to be protected. The positive liberty construction, on the other hand, invites judicial examination into the private home to consider the conduct and determine whether the liberty is deserved. A liberty contingent upon sphere is protected concretely as a matter of place while a liberty contingent upon conduct may be revoked by a subjective judgement of conduct. In *Lawrence* the protection of parenting rights hinged upon whether or not the rights interfered with others (the Court found that they did not.) Yet parenting privacy rights necessarily interfere with children. Thus, parenting rights hinge upon whether or not their interference *is deemed acceptable*.

Parents who are the subject of child protective proceedings, accused of harming their children, cannot claim that their parenting liberties do not interfere with their children. Thus, their necessary interference is scrutinized. One might argue that defining conduct (whether one is acting in the capacity of a parent) is no more difficult than determining sphere (whether one is acting privately within one’s home.) However, in the following section I will argue that the question upon which parenting rights are contingent is not whether one is acting as a parent but rather whether one is acting as a *good* parent—a far more subjective inquiry.

Family Privacy is Necessarily Weaker than Individual Privacy Because Privacy is Protected as an Individual Liberty

In an individualistic and adversarial legal system, the invocation of privacy as protection for parenting rights makes clear sense. One of the most fundamental concepts in U.S. political thought is the separation of the private and public spheres wherein private actions are better protected from government interference because they concern only the individual actors.⁷⁷ If rights are fundamentally understood as things that attach to individual persons and privacy (in the straightforward, individualistic sense) is contingent upon non-interference, the condition of only impacting the individual actor then privacy rights must be protected by virtue of being individual rights. In other words, is easier to protect a right within an individualistic system when the exercise of that right impacts only the individual rights-bearer. With the dominant legal ideology of individualism in mind, it is clear why individual privacy is a strong basis for legal protection. However, when a privacy right does not conform to the individualistic model, how is can its protection be secured?

While the *Troxel* Court may have protected family privacy as a fundamental liberty, the way in which it recognized privacy as it applies to the family unit was still individualistic. It recognized parenting rights are as the rights of individual parents to raise their children, not collective rights of a family unit. In the child welfare system, state intrusion, the violation of privacy, takes the form of the separation of children and parents. Privacy constructed individualistically does not form a strong basis for protection against this violation. Especially

⁷⁷ *Lawrence v. Texas* 539 U.S. 558 (2003) *Eisenstadt v. Baird*, 405 U.S. 438 (1972) at 453)

for families whose privacy has historically been diminished, the child welfare system treats the rights of parents as necessarily in conflict with the rights of children, constructed as victimized individuals. The strength of individualism codified in U.S. law and culture ensures that the privacy of families as interdependent groups is poorly protected. Not only does the doctrine of privacy refuse to recognize rights as belonging to families collectively, but it also protects rights *specifically because* they pertain to individuals and supposedly no one else.⁷⁸

Yet when families are at risk of being separated in child protective proceedings, it is collective, rather than individual privacy that is in need of legal recognition. To adequately protect against state interference, judges need to recognize the essential differences between family privacy and individual privacy. This involves recognizing the potential for harm to non-rights-bearing individuals as well as the non-individualistic reasons for protecting parenting rights such as parenting responsibility and parent-child relationships. Courts' interpretations of privacy rights must acknowledge the non-individual reasons for privacy's protection.

4. The Individualization of Poverty and The Productive Use Condition

“There are separate systems for poor and for wealthier families. Public child welfare departments that investigate child maltreatment and place children in out-of-home care handle almost exclusively problems of poor families.”

- Dorothy Roberts, *Shattered Bonds: the Color of Child Welfare* (2002) p. 26

⁷⁸ *Id.*

In Section 3, I argued that privacy rights are intrinsically conditional. Parenting rights necessarily fail one of the privacy right conditions (the non-interference condition) because raising children by definition entails interfering with children.⁷⁹ In an individualistic legal system, parenting rights are weaker than individual privacy rights due to their failure to meet the non-interference condition. They are less individual and therefore less well-protected.

This section shifts focus to the right branch of privacy right conditions: ‘productive use’ and its subconditions. If the exercise of a privacy right is presumed to generate social value, it meets the productive use condition. If it is presumed to generate no social value or negative social value, it fails the productive use condition. Like the non-interference condition, failure to meet the productive use condition diminishes privacy rights. Understanding how the productive use condition functions, how its negation diminishes parenting rights, illustrates the greater threat of the indeterminacy problem to parents and children in the child welfare system.

Differences Between Divorce and Child Welfare Custody Cases Render Indeterminacy Mobilized by the Productive Use Condition a Greater Threat in the Latter

There are several relevant differences between child welfare custody cases and divorce custody cases. The main difference is that a divorce case is initiated by the dissolution of a marriage, whereas a child protective case is initiated by an allegation of child abuse or neglect. A second major difference is the relative positions of litigants. In divorce cases, the parties are usually two parents; in child protective cases, the parties are usually a parent or parents versus a

⁷⁹ See *Family privacy* diagram, left branch of failed conditions.

state agency. The parent or family is usually fighting to retain custody of the child while the child protective agency is attempting to place or keep the child in state custody. While two parents in a divorce case may have different resources, their rights are essentially the same: parenting rights are fundamental privacy rights. In child protective cases, the state agency and parent(s) are on less equal footing in terms of rights. Their claims to the child are not the same or even parallel. The state's claim is not a fundamental privacy right, but rather, as discussed in Section 2, a function of its *parens patriae* power.

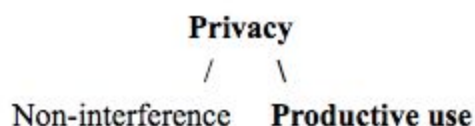
While the fundamental concern at hand in child protective proceedings is still 'the best interests of the child,' the question before the judge is formulated differently. When a judge assesses the best interests of the child in a divorce case they are usually deciding which of two parents the child should primarily live with. In child protective proceedings, on the other hand, the judge is usually tasked with determining whether a child should be removed from its parents' home. The assessment of 'best interests,' thus, is not a question of which parent would be a better primary caretaker, but rather whether it is in a child's 'best interests' to stay within a parent's care.

Under these different questions, different arguments become advantageous. Both parties in divorce cases have fundamental privacy rights and either may win custody without proving the other unfit. In child protective cases, the state has no pre-existing right to custody.⁸⁰ Winning custody, for the agency, requires disqualifying a parent as 'unfit' because the state has no claim to the child if the parent's claim cannot be diminished. The state can only activate its *parens patriae* powers if it can convince the court of parental unfitness.

⁸⁰ *Troxel v. Granville* (2000), 530 U.S. 57. (Citing *Parham v. J. R.*, 442 U.S. 584, 602, 61 L. Ed. 2d 101, 99 S. Ct. 2493 Asserting that states can't intervene in the private home unless parents are proven unfit)

Put differently, a state agency, unlike a parent, has no right to the child independent from that child's interests. The only leverage the state has in a custody dispute must therefore be framed within the child's 'best interests.' A parent in a divorce custody case need only show that the child would be better off in their care. A state agency, on the other hand, cannot assert merely the benefits of agency custody over parental custody as an invocation of 'best interests.' For a state to argue that a child would be better off in foster care (when they would be fine left at home) would not only be evidently insincere to most people familiar with the foster care system, but would also not be enough alone to justify removing the child. Because a state agency can only invoke *parens patriae* powers if it can prove a parent unfit, to assert the benefits of agency over parental custody is not an advantageous argument for the state to make. Thus state agency arguments in child protective proceedings are generally not about what serves children best but rather what disqualifies parents from the privacy rights that would protect them from state interference.

Parenting Rights are Conditioned by The Social Value Their Exercise is Presumed to Generate, The 'Productive Use' Condition



The productive use condition. Productive use is the second condition privacy rights are contingent upon. If a privacy right is presumed to generate social value, it meets the productive use condition. If it is presumed to generate no social value or negative social value, it fails the productive use condition. The negation of the productive use condition diminishes parenting rights.

When a parent has been deemed unfit, empowering the state to take custody of a child, one can understand the parent's rights as having been diminished by a failure to meet the productive use condition. Under the productive use condition, privacy rights are strengthened when their exercise is presumed to produce social value and weakened when their exercise is presumed not to produce social value. Parental fitness, defined via the productive use condition, hinges upon the social good one's child-rearing is presumed to generate. This supports a particular mobilization of the best interests standard in the child welfare system; it prompts an inquiry into the value generated by the exercise of the parent's rights and a focus on the parent rather than the child.

The argument in this section is based largely upon the work of legal theorist and ethnographer, Khiara Bridges. In *The Poverty of Privacy Rights* (2017), Bridges untangles the cultural assumptions that comprise the productive use condition, explicating the relationship between the condition and its subconditions. Bridges argues that the condition acts as a vehicle for cultural, historic patterns of racism and classism enacted in the child welfare system. I represent Bridge's argument through the right branch of conditions in the privacy rights diagram. Productive use is unlike non-interference in a fundamental way: it is not intrinsically tied to the nature or structure of parenting, but rather, it is selectively enforced in accordance with dominant social ideologies, and often not in accordance with the interests of children.

Bridges prefaces the productive use condition by asserting that privacy, as a fundamental liberty, is generally protected because of an (individualist) cultural assumption that privacy contributes to public good. The strength of a privacy right depends upon the public good its exercise is presumed to produce. The value of privacy is therefore, not an intrinsic value (privacy

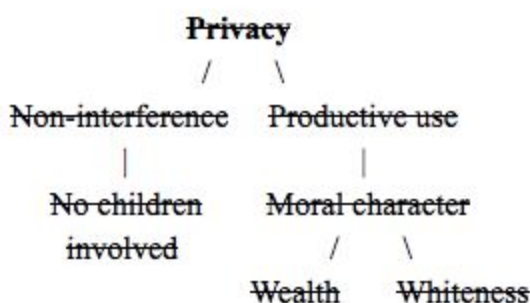
for privacy's sake) but rather an instrumental value (privacy for social benefit.) The state justifies its interference with privacy, its claims to child custody, as a means of ensuring that privacy as an instrumental good is being put to productive use. Bridges argues that the claim that privacy is an instrumental good helps to explain why privacy rights may be weakened or revoked when they do not generate *or appear to generate* value.

There is a particular way in which the indeterminacy of the best interest standard is mobilized under the productive use condition. Whether or not a parent is using their privacy rights to raise children 'productively' is a fundamentally different inquiry from 'What is in the child's best interests?' Whether or not a parent is using their privacy rights productively also requires a more subjective assessment than that of the non-interference condition. If a child is involved, as is the case in the exercise of all parenting rights, the non-interference condition is clearly unmet. Yet the inquiry the productive use condition prompts is not as straightforward. A focus upon this condition, in the child welfare system, allows for the best interests standard to be mobilized via judgements about whose child-rearing is 'productive,' whose decisions to raise children contribute to the public good.

Wealth and Whiteness are Subconditions of the Productive Use Condition Because of a Moral Construction of Poverty

Bridges argues that the 'productive use' mobilization of the best interests standard in child protective proceedings strips poor, often black mothers of privacy rights. This means that when the parent in a child protective proceeding is a poor mother neither the state *nor the parent*

has a fundamental privacy right: there is *no fundamental right* which the state must diminish in order to remove a child from their home.⁸¹ Bridge's central claim is that poor mothers are not given privacy rights because they are presumed to fail the productive use condition. "The law presumes that their enjoyment of privacy will realize no value or a negative value."⁸² The "invasion of poor womens' privacy," when a state agency removes a child from their home, is therefore "argued to be an unfortunate yet inevitable consequence" of ensuring that the mother's privacy rights are being put to productive use.⁸³ Why do poor mothers presumptively fail the productive use condition? Poverty, under the productive use condition, is taken as evidence against productivity.



Family privacy of poor black mothers. Bridges argues that privacy rights are nonexistent for poor black mothers, because dominant cultural ideology conflates black poverty with poor moral character, and presumes that poor moral character precludes the productive use of privacy rights. Here, Bridges' argument (right branch of the diagram) is framed within the broader argument that family privacy is necessarily weaker than individual privacy, because parenting necessarily interferes with children (left branch of the diagram.)

⁸¹ Bridges focuses on mothers specifically and explains that comparable research has not yet been done on poor fathers.

⁸² Bridges, Khiara p. 12

⁸³ *Id.* p. 7

The ‘moral construction of poverty’ refers to a dominant cultural narrative of poverty as an individual, moral problem. It describes the cultural associative ties between wealth, whiteness, positive moral character and a presumption that one contributes productively to society. Wealth is conflated with positive moral character, and conversely, poverty with moral (individual) deficiency. The moral construction of poverty is an “individualist idea that people are poor because there is something wrong with them” or “behaviorally and/or ethically flawed (their poverty proves as much.)”⁸⁴ It assumes that poor mothers will not put their privacy rights to good, ‘productive’ use. The perception of poverty as a sign of individual moral deficiency is furthered by racial stereotypes deeply rooted in U.S. history and culture. The result, Bridges argues, is that poor mothers, many of whom are black, have no actual privacy rights.

Understanding the implications of the moral construction of poverty requires the acceptance of a premise critical legal theorists such as Martha Fineman propose: the law is not independent from culture; rather, the law is fundamentally a tool of culture. The use of law to change culture may be effective but only insofar as it entails the appropriation of a tool against its intended use.⁸⁵ If one accepts this relationship between law and culture, the cultural moral construction of poverty can be seen to shape (the deprivation of) real legal privacy rights. Bridges describes the same relationship between culture and law: the “individualist, moralizing explanation for poverty accepted by society” and “the architects of these laws and the jurists that interpret these laws [through the productive use condition] as consistent with the Constitution.”⁸⁶ The denial of rights to poor, often black mothers whose child-rearing is deemed ‘unproductive’

⁸⁴ Bridges, Khiara p. 12

⁸⁵ Fineman, Martha p. 15

⁸⁶ Bridges, Khiara p. 8

by the moral construction of poverty gives force to the structural biases the productive use condition is built upon.

Racism Perpetuates the Moral Construction of Poverty

The power of the moral construction of poverty relies upon cultural attitudes made possible by a history of racial subordination in the U.S. Without considering this history, the claim that privacy rights are not universal but conditional, and that individuals might be stripped of privacy rights “on the basis of presumed shortcomings,”⁸⁷ is more difficult to accept. Bridges emphasizes that the “dispossession of privacy rights based upon poverty disproportionately affects black parents because black parents are disproportionately represented among the poor.”⁸⁸ According to a 2015 child poverty report, one in three black children are poor compared to one in eight white children.⁸⁹ While poverty increases the likelihood of a parent’s inability to provide for their children, poverty alone does not constitute child neglect. However, poor black women are deemed ‘unproductive’ via the moral construction of poverty merely for raising children. Racist cultural attitudes validate perceptions of poor black mothers as unfit parents, perpetuating a conflation of black poverty and child neglect.

The moral construction of poverty is pervasive not only throughout U.S. media and popular culture, but also within legal and political discourses. One influential instance of the moral construction of poverty in politics originated in a report by the U.S. Department of Labor under the Johnson administration in 1965. ‘The Negro Family: The Case For National Action’

⁸⁷ Bridges, Khiara p. 19

⁸⁸ Bridges, Khiara p. 32

⁸⁹ Federal Interagency Forum on Child and Family Statistics (2017)

also known as the ‘Moynihan Report’ legitimized a construction of black poverty as the result of problems intrinsic to black culture. The author of the report, Daniel Patrick Moynihan, attributed the high rate of black poverty to the high rate of single mothers in predominantly black neighborhoods.⁹⁰ Moynihan blamed black poverty on black culture and family norms rather than cultural racism or economic structural forces. Moynihan, a Democrat from New York, served multiple terms as senator and was an adviser to President Nixon. The Moynihan Report influenced liberal welfare policy as well as political narratives about race and poverty.⁹¹

Racism also influences disparate applications of the same child welfare laws. A study conducted by child welfare researcher Janet Dolgin compared different outcomes of child protective proceedings in which parental substance use was a factor, where the substance in question had a racialized cultural association. The study compared cases in which the substance at hand was ‘crack’ cocaine (associated in U.S. media with poor black communities) versus cases in which the substance at hand was cocaine hydrochloride (associated in U.S. media with wealthy white communities.) The study found, above any other factor, “a strong tendency of courts to base neglect determinations against parents who misuse drugs and alcohol on the parents' social and financial class.”⁹² Parents using ‘crack’ cocaine were perceived to be more dangerous to their children despite the chemical similarities between ‘crack’ cocaine and cocaine hydrochloride. Cultural attitudes about race rooted in the U.S. history of racial subordination contribute to the moral construction of poverty in political, legal, and cultural discourses and subsequently the child welfare system.

⁹⁰ Moynihan, Daniel. "The Negro Family: The Case For National Action". United States Department of Labor. Archived from the original on 28 April 2014.

⁹¹ Steinberg, Stephen. "Poor Reason - Culture still doesn't explain poverty", [Boston Review](#), January 13, 2011.

⁹² Dolgin, Janet L. The Law's Response to Parental Alcohol and 'Crack' Abuse, 56 Brook. L. Rev. 1213 (1991) Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/437 p. 1245

The claims of the Moynihan Report and the racial bias suggested by Dolgin's study have been present in U.S. culture, law and politics since the founding of the nation, during slavery, and they persist in modern times. Bridges writes,

“Age old cultural discourses construct individuals racialized as black as pathological—as indolent, as sexually incontinent, and criminally inclined, and so forth. When those who comprise the poor are disproportionately black, then it is consistent with extant cultural discourses to suppose that the poor are poor because they are pathological—because they are indolent sexually incontinent, criminally inclined, and so forth. Moreover, when those who are denied privacy rights in the basis of an ostensible race-neutral criterion-presumed character—are disproportionately black, race explains why the country finds this result “politically acceptable.”⁹³

The moral construction of poverty helps to explain the overrepresentation of poor and black children in the foster care system. Poverty is not taken merely as a risk factor, correlated with child neglect. Poverty, constructed as an individual, moral, racialized problem, is taken as evidence itself of child neglect. The vast majority of child protective cases (74.9 percent) concern allegations of neglect rather than abuse.⁹⁴ In 1994, child welfare researcher Duncan Lindsey, found that "studies clearly demonstrate that child abuse is not the major reason children are removed from their parents." Rather, "inadequacy of income, more than any other factor, constitutes the reason that children are removed."⁹⁵ Because child neglect is often ambiguously defined and shares many of the characteristics of poverty, allegations of neglect are much more difficult than allegations of abuse to parse from poverty.

Child welfare policy researchers Joy Duva and Sania Metzger describe the conflation of poverty with child neglect: “While state definitions of child neglect may vary, they often involve

⁹³ Bridges, Khiara p. 39

⁹⁴ Child Maltreatment 2017. Children's Bureau (Administration on Children, Youth and Families, Administration for Children and Families) of the U.S. Department of Health and Human Services <https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf> p. ii

⁹⁵ Lindsey, Duncan. *The welfare of children*. Oxford University Press, 2004.

a primary caretaker knowingly or negligently allowing a minor child to be deprived of the basic necessities of food, clothing, shelter, or care (Child Welfare Information Gateway, 2007).

Poverty, however, is also defined in terms of inadequate food, shelter, and clothing. As a result, poverty can be mistaken for and labeled as neglect.”⁹⁶

Yet the term ‘mistaken’ evokes merely individual misjudgements. Above poverty, receiving public assistance is the greatest predictor of involvement in the child welfare system. Dorothy Roberts writes, “children from families who receive welfare are at the greatest risk for involvement in the child welfare system, especially for neglect. Researchers estimate that half of the families referred to child protective services received welfare at the time of referral.”⁹⁷ The incidental individual misjudgements of agencies and courts, the mere confusion of poverty with neglect, does not explain why poor families are punished for seeking state assistance *in order to remedy* the conditions of poverty that might lead to child neglect.

Roberts argues that the explanation for poverty as a risk factor cannot merely be that child maltreatment is more common among the poor. It would be less tenable yet to claim that being on welfare encourages child maltreatment. While the receipt of public assistance might be an indicator of poverty, it might just as easily be taken as an indicator of poor families’ efforts to provide children with food, shelter, and clothing--to prevent child neglect. Public assistance likely alleviates some of the stresses of poverty and improves children’s living conditions.

Instead, Roberts argues that poor families are more likely to be reported to state agencies and reports of maltreatment by poor families are more likely to be confirmed by judges due to the moral construction of poverty. Roberts argues, “raising children in poverty looks like

⁹⁶ Duva, Joy and Metzger, Sania ‘Addressing Poverty as a Major Risk Factor in Child Neglect: Promising Policy and Practice’ 2010 <http://childhub.org/sites/default/files/addressing-poverty-as-a-major-risk-factor-in-child.pdf>

⁹⁷Roberts, Dorothy p. 29

parental unfitness if you believe that poor people are responsible for their own predicament and are negative role models for their children.”⁹⁸ A more tenable explanation for why receiving welfare is the strongest predictive factor for involvement in the child welfare system is that state involvement in one aspect of family life enables state surveillance in another.

Individualism Perpetuates the Moral Construction of Poverty

Individualism as a dominant legal and cultural norm plays a critical role in the moral construction of poverty, the bias given force by the productive use condition. In addition to rendering family privacy (the form of privacy rights parenting belong to) weaker than individual privacy, individualism furthers a narrative that poverty is not a social problem but an individual one. Poverty is seen as evidence of an individual’s inability to succeed due to the individual’s deficient moral character. Yet Bridges argues that U.S. cultural conceptions of poverty are not universally individualistic. Rather, dominant cultural narratives acknowledge the structural nature of poverty when the face of poverty is white, but construe the poverty of black families as a deserved consequence of individual behavioral or moral deficiencies.⁹⁹ Both the individualization of privacy as well as the moral, racialized construction of poverty allows for the instrumental mobilization of the best interests standard via cultural, historic biases, against poor, often black mothers in the child welfare system.

As I argued in Section 3, individual privacy rights, unlike family privacy rights, are strengthened by their individual impact. Poor mothers do not have the kind of individual privacy

⁹⁸ Roberts, Dorothy p. 26

⁹⁹ Bridges, Khiara p. 10

protected in *Lawrence* and *Griswold*, in which the individual nature of conduct strengthens the protection of rights. In these cases, it is precisely the individuality of the actor and the sphere of the action separate from public communal life that affords privacy greater protection. Yet the constructed individuality of poverty is precisely what strips poor mothers of privacy rights in child protective cases. As Bridges argues, the more ‘personal’ the construction of one’s poverty, the less protected one’s privacy rights become.

Child Protective Cases share Prosecutorial Characteristics with Criminal Cases

“The point of a CPS investigation is to divest the family and the members that constitute it of privacy so that they may become visible to the state, enabling the state to determine whether the parents are competent to raise their children without ongoing intervention and regulation.”

- Khiara Bridges, *The Poverty of Privacy Rights* (2017) p. 10

Like divorce custody cases, child protective proceedings are civil law cases adjudicated in family court. Accordingly, the question in child protective proceedings should not be the guilt or innocence of the parent(s) as it would be in a criminal trial but rather the best interests of the child. Yet custody scholars note that child protective proceedings, due to their focus on parental misconduct, share characteristics with criminal trials. Family law scholar Douglas Besharov argues,

“It is a mistake to ignore, or deny, the essentially prosecutorial function of the attorneys who assist [state agencies in child protective proceedings] ... The benign purposes of child protective proceedings should not obscure the fact that they may result in a intrusion into family life. . . . [Such a proceeding] ‘by its very nature resembles a criminal prosecution. The defendant is charged with conduct - failure to care properly for

her children - which may be criminal and which in any event viewed as reprehensible and morally wrong by a majority of society”¹⁰⁰

Like the criminal justice system, the child welfare system in major cities is expansive and largely privatized. In 2018, the New York State child protective agency, The Administration for Children's Services or ACS was involved with 49,876 children.¹⁰¹ ACS placed 3,805 children into foster care.¹⁰² With parenting rights predicated upon a racialized moral construction of poverty, the child welfare system, like the prison system, is one of the most racially segregated institutions in the United States.¹⁰³ There are significant racial disparities between the cases the agencies choose to pursue in court, and from these cases, which children eventually end up in foster care.¹⁰⁴ In 2016, twenty-three percent of children in foster care in the U.S. were black, while forty-four percent were white.¹⁰⁵ Black children were more than twice as likely to be placed in foster care than white children.¹⁰⁶

However, the child welfare system and criminal justice system are not only similar insofar as they are built upon similar systemic biases; they are also functionally connected. According to a 2015 Children's Bureau report, almost one-fifth of reports to U.S. child protective agencies were made by police (approximately four hundred thousand reports

¹⁰⁰ Douglas J. Besharov, *The "Civil" Prosecution of Child Abuse and Neglect*, 6 408-09 (1981), quoting *Meitzer v C. Buck LeCraw & Co*, 402 US 954, 959 (Quoting Justice Black's Dissent)

¹⁰¹ *Children* Served by Child Welfare Prevention Services by Home Borough/CD, CY 2018* Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

¹⁰² *Id.*

¹⁰³ Roberts, Dorothy p. 3

¹⁰⁴ *Id.*

¹⁰⁵ *Child Welfare Information Gateway*. (2017). *Foster care statistics 2016*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.

¹⁰⁶ (The U.S. population in 2016 was 12.7 percent black and 76.9 percent white.) "Quick Facts – Race and Hispanic Origin". United States Census Bureau. Retrieved April 8th, 2019.

nationally.)¹⁰⁷ Criminal justice researcher, Frank Edwards describes the centrality of police participation in the “diffuse surveillance system formalized by mandated reporting laws” in the child welfare system.¹⁰⁸ Every state has some form of mandated reporting laws, which require all adults or specific professionals to report any instance of suspected child abuse or neglect to child protective agencies.¹⁰⁹

Edwards notes that police already fulfil a role in state surveillance, and unlike other mandatory reporters, “police can gain access to observe the daily lives of children and families at home with or without the consent of a subject family.”¹¹⁰ Edwards’ research indicates that “police file more reports of child abuse and neglect in counties with high arrest rates.”¹¹¹ If interactions with police are more likely to lead to child protective investigations where interactions with police are more common, and if interactions with police are more common (and more likely to escalate) in poor and black neighborhoods, then the near one-fifth of reports to child protective agencies initiated by police directly contribute to the disproportionate representation of poor and black children in the child welfare system.

In Section 3, I argued that parenting rights are an intrinsically weaker form of privacy right due to their failure of the non-interference condition. Parenting rights are further weakened by the contingency of privacy rights upon the moral construction of poverty via the productive use condition. Parenting rights as privacy rights are thus doubly diminished. First, as a function

¹⁰⁷ Child Maltreatment 2015. Washington: U.S. Department of Health and Human Services, Administration for Children and Families. Accessed April 5, 2019. <https://www.acf.hhs.gov/sites/default/files/cb/cm2015.pdf>.

¹⁰⁸ Edwards, Frank. “Family Surveillance: Police and the Reporting of Child Abuse and Neglect.” *RSF: The Russell Sage Foundation Journal of the Social Sciences*, vol. 5, no. 1, 2019, pp. 52. *JSTOR*, www.jstor.org/stable/10.7758/rsf.2019.5.1.03.

¹⁰⁹ Children’s Bureau. 2016. Mandatory Reporters of Child Abuse and Neglect. Washington: U.S. Department of Health and Human Services, Administration for Children and Families. <https://www.childwelfare.gov/pubPDFs/manda.pdf>

¹¹⁰ Edwards, Frank. P. 50

¹¹¹ *Id.*

of the intrinsic nature of parenting rights whereby children are necessarily always affected, secondly, by the moral construction of poverty as individual failure. Poor mothers are often black, and race plays a critical role in their access to rights in the U.S. legal system. The moral construction of poverty perpetuates a race and class-based notion of who deserves to raise children, who is entitled to privacy and due process, and whose hardship signifies an inability to parent rather than a broken social security net.

The productive use condition is not responsive to actual productivity (if it could be quantified in child-rearing) but rather to assumptions about productivity based upon the moral construction of poverty. It is not about an actual value produced, but rather *expected value*. Poor, often black mothers, are not *assumed* to produce social value by raising children. The moral construction of poverty provides the connection between productive use and poverty as its subcondition. Because a moral construction of poverty negates the productive use condition, and in the case of parenting rights the non-interference condition is already failed, poor, often black mothers in the child welfare system do not have privacy rights.

Conclusion

Individualism as a legal and political norm allows for the mobilization of the best interests standard via systemic biases in the child welfare system in four ways: First, through the

misperception of bias in child protective disputes as ‘individual’ and ‘incidental,’ disconnected from the history and structure of our legal system and state. Secondly, through the construction of the individual child victim in need of state protection, erasing the victimization of poor families. Additionally, through the diminishment of family privacy rights because their impact is non-individual. Finally, through the construction of parents’ poverty as individual rather than societal failure.

Section 1 surveyed the indeterminacy problem of the best interests standard, and concluded that the legal system is a blunt instrument at best for advancing the interests of children. Yet if indeterminacy impedes this purpose in divorce cases, it can be seen to serve a contrary purpose within the child welfare system. The vagueness of the best interests standard and the frequent impossibility Elster asserts of objective assessment enable judges to consider factors other than the best interests of the child. The productive use condition (discussed in Section 4) is one such non-child factor. Judgements about whether poor mothers are using their privacy rights productively act as proxy for the best interests of the child.

Yet the influence of this non-child factor is not an incidental result of individual bias. The moral construction of poverty which the productive use condition is built upon is deeply rooted in U.S. history and culture. Indeterminacy, in and of itself, is not as dangerous as the routine, systematic practices of economic and racial subordination it enables in the child welfare system. It is not that classist and racist assumptions never influence indeterminate applications of the best interests standard in divorce cases, but rather that the different positions of litigants in child protective proceedings, in addition to the shift in emphasis towards parental misconduct, facilitates the routine deprivation of poor, often black mothers’ privacy rights.

Could indeterminacy in child protective proceedings be resolved by a coin toss? Before the state had proven its case to activate its *parens patriae* powers, the coin toss would give it a 50 percent chance of gaining custody. The parent, who had not yet been proven unfit, would face a 50 percent chance of losing their child to foster care. The parent and state agency do not have equal stakes in child custody. This asymmetry changes the nature of the potential unfairness in child protective proceedings, and is the reason why the indeterminacy of the best interests standard is a bigger, more complex problem in the child welfare system.

The best interests standard's indeterminacy makes room for the exacerbation of asymmetry between the state and poor parents, families who have cards already stacked against them. What a vague standard means for two similarly-situated parents litigating for custody is *critically different* from what broad discretion means in the hands of a judge assessing the 'best interests' of a child of a poor family at risk of being put into foster care. For a poor parent whose poverty is pathologized as personal irresponsibility, indeterminacy is far greater threat. For this parent, the slippage from 'assessment of fitness for custody' to 'judgement of personal worth,' indeterminacy mobilized by the productive use condition, becomes exponentially more dangerous.

The productive use condition is central to the child welfare indeterminacy problem. In child protective proceedings the litigants, the questions, and the arguments are not the same as in divorce custody cases. Under the productive use condition, parenting rights and true inquiries into children's best interests are eclipsed by cultural assumptions about guilt, immorality, poverty and presumed contribution to public good: who deserves privacy rights and whose child-rearing is seen as generating social good or harm. These value judgements are not the

product of variable, individual bias, but rather produced by cultural biases rooted in historic patterns of subordination. Furthermore, perception of these biases through an individualist framework (as in most formulations of the indeterminacy problem) disguises their extent and nature. The indeterminacy of the standard, mobilized by these assumptions, works not only to the detriment of parents' interests, but also to the detriment of the interests and wellbeing of children.

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